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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Nour Eddine Elasali, Plaintiff, vs. Sun Diego, Rich Illes, Scott Mcloud, John Swets, Lori Ortiz, Lorenzo Ortiz, DOES 1 - 100, Defendants.	**CASE NO: C 07 cv02272 W (JMA)** **DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION; OR IN THE ALTERNATIVE DUE TO A PARALLEL STATE ACTION PENDING, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT.** Date: June 30, 2008 Judge: Hon. Thomas J. Whelan Dept: 7 [NO ORAL ARGUMENT PER LOCAL RULE]

I. INTRODUCTION

Defendants SURERIDE CHARTER, INC. dba SUN DIEGO CHARTER CO. (erroneously sued as "Sun Diego"), RICH ILLES, and SCOTT MCLEOD (erroneously sued as "Scott Mcloud") (hereinafter collectively referred to as "Defendants") file this Motion to Dismiss on the basis that: (1) complete diversity does not exist; (2) the amount in controversy does not exceed $75,000.00; and (3) Plaintiff already has a parallel action filed in State Court. Consequently, this Court lacks subject matter jurisdiction, and the interests of justice dictate that this Complaint should be dismissed. Indeed, since Plaintiff already has an action in State Court regarding the same factual issues, the resources of two Court should not be expended; and potentially conflicting rulings on legal issues based upon the same facts should not occur.

II. PROCEDURAL HISTORY

- On December 3, 2007, Plaintiff first filed a Complaint in Federal Court. However, said Complaint was dismissed because of a Motion that was denied. Thus, no fees were paid to have the Complaint filed in Court, which Defendants believe was the reason for the dismissal of the Complaint. (Declaration of Davina Bloom ¶ 2.)
- Plaintiff filed a Request for Appointment of Counsel, which was denied. (Declaration of Davina Bloom ¶ 3.)
- There were two (2) summons to the Complaint that were returned, one for Sureride and one for Rich Illes. (Declaration of Davina Bloom ¶ 4.)
- On January 11, 2008, Plaintiff's First Amended Complaint was filed with this Court. (Declaration of Davina Bloom ¶ 5.)
- On May 14, 2008, Defendant Rich Illes was served with the First Amended Complaint. (Declaration of Davina Bloom ¶ 6.)

III. CONTROLLING LAW

The Court has authority to provide the requested relief based upon the Federal Rules of Civil Procedure, particularly Rule 12(b). Rule 12(b)(1) requires a complaint to be dismissed when the Court lacks subject matter jurisdiction.

Rule **12(b)** of The Federal Rules of Civil Procedure provides that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: **(1) lack of jurisdiction over the subject matter,** (2) lack of jurisdiction over the person, **(3) improper venue**, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. (Emphasis added.)

Thus, sub-sections (b)(1) and (b)(3) of this Rule, as established above, provide this Court authority to dismiss the Complaint, as there is no federal subject matter jurisdiction and since this Court is an improper venue (based on the fact that the Plaintiff already filed an action in State Court regarding the same facts and claims, as will be discussed more thoroughly below.)

IV. ARGUMENT

A. BASED ON PLAINTIFF'S ALLEGATIONS, THERE IS NOT SUBJECT MATTER JURISDICTION; AND THUS THIS MOTION SHOULD BE GRANTED.

Plaintiffs have alleged that the Court has jurisdiction over this matter, pursuant to 28 U.S.C. § 1332, in that it is a civil action between citizens of different states, and solely relies on that for federal subject matter jurisdiction. Pursuant to 28 U.S.C. § 1332 (a), the district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between – (1) Citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a state or of different states. Diversity jurisdiction exists over any civil action in which the amount in controversy exceeds the sum or value of $75,000, exclusive of costs and interests, and the action is between citizens of different states. 28 U.S.C. §1332(a). Moreover, diversity jurisdiction exists only when there is complete diversity, i.e., none of the defendants (***served or not***) is a citizen of the same state as any of the plaintiffs. Morris v. Princess Cruises, Inc. 236 F.3d 1061, 1067 (9th Cir. 2001.)

1. Complete Diversity Of The Parties Does Not Exist.

Despite Plaintiff alleging that this Court has jurisdiction under 28 U.S.C. § 1332, complete diversity does not exist because as Plaintiff acknowledges and alleges: (1) "Plaintiff is and was at all times mentioned herein a citizen of the State of California"; (2) "...Sun Diego is a corporation incorporated under the laws of California having its principal place of business in California"; (3) "...All defendants reside in this district..." (Please see Plaintiff's First Amended Complaint, paragraphs 1 - 3.)

Section 1332(a)(1) of the diversity statute requires complete diversity between the parties, and jurisdiction is lacking if any plaintiff and any defendant are citizens of the same state. Strawbridge v. Curtiss, 7 U.S. 267 (1806); The Mennen Co. v. Atlantic Mutual Ins. Co., 147 F.3d 287, 290 (1998). Additionally, in 1958, Congress amended 28 U.S.C. § 1332 by adding sub-section (c)(1), which provided in relevant part that "a corporation shall be deemed to be a citizen of any State by which it has been

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incorporated and of the State where it has its principle place of business." Act of July 25, 1958, Pub. L. No. 85-554, 72 Stat. 415 (codified at 28 U.S.C. § 1332(c)(1)).

One of Congress's main purposes in enacting subsection (c)(1), was to curtail the availability of diversity jurisdiction: "In adopting this legislation, the committee feels... that it will ease the workload of our Federal courts by reducing the number of cases involving corporations which come into Federal district courts on the fictional premise that a diversity of citizenship exists." S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 3099, 3101. The alleged basis for jurisdiction herein is exactly the sort of fictional diversity Congress sought to eliminate.

Plaintiff also admits in his State Complaint the following: "...at least one defendant now resides in its jurisdictional area; "the principal place of business of a defendant corporation or unincorporated association is in its jurisdictional area." (Please see Plaintiff's State Complaint, paragraphs 8(a) and (b), attached to the Request for Judicial Notice as Exhibit 1, which is being filed concurrently with this Motion to Dismiss.) Thus, Plaintiff also admits in his state action that diversity jurisdiction does not exist. Consequently, via Plaintiff's own admissions, complete diversity does not exist.

2. The Required Amount In Controversy Does Not Exist.

Plaintiff has failed to allege that the requisite amount in controversy exists, and consequently this Motion must be granted. 28 U.S.C. § 1332 provides that the district courts shall have original jurisdiction of all civil actions where the matter in controversy **exceeds the sum or value of $ 75,000**, exclusive of interest and costs. 28 U.S.C. § 1332. However, Plaintiff's Amended Complaint states the following: "...The amount in controversy exceeds $50,000.00, exclusive of interest and costs." (Please see Plaintiff's First Amended Complaint, paragraph 2.) It cannot be denied that Plaintiff has failed to properly allege jurisdiction of this Court. In fact, both elements of 28 U.S.C. § 1332 have not been alleged - i.e. (1) complete diversity does not exist, and (2) the amount in controversy does not exceed $75,000.00. In conclusion, this Court lacks subject matter jurisdiction. In the event that the foregoing is unconvincing, an evidentiary hearing is requested on the issue of subject matter jurisdiction.

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B. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS A PARALLEL ACTION ALREADY PENDING IN STATE COURT.

Although Plaintiff already filed an action in State Court involving the same central factual issues on July 3, 2007, Plaintiff thereafter filed an action in this Court on January 11, 2008.[1] Due to the fact that Plaintiff attempts to gain a contemporaneous exercise of jurisdiction by different courts over sufficiently parallel actions, a federal court has discretion to dismiss an action based on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation. Colorado River Water Conservation Dist. v. United States (1976) 424 U.S. 800, 817. The two actions need not exactly parallel each other to invoke the Colorado River doctrine; it is enough that the two cases are substantially similar. Gintz v. Jack In The Box, Inc. 2006 U.S. Dist. LEXIS 88987 at 8; Nakash v. Marciano (1989) 882 F.2d 1411, 1417 (9th Circuit.)

1. The Colorado River Factors Favor Dismissal Of This Federal Action.

The Colorado River case announced a balancing test weighing four factors to determine whether sufficiently exceptional circumstances existed to all a Motion to Dismiss on "parallel" actions. These factors were as follows: (1) whether either court has assumed jurisdiction over property in dispute; (2) the relative convenience of the forums; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which the concurrent forums obtained jurisdiction. Colorado River Water Conservation Dist. v. United States (1976) 424 U.S. 800, 818. Subsequently, in Moses H. Cone Hospital v. Mercury Const. Corp. (1983) 460 U.S. 1 at 23, 26, the Supreme Court added two more factors: whether State or Federal law provides the rule of decision on the merits, and whether the State proceeding is adequate to protect the parties' rights. Moses H. Cone Hospital v. Mercury Const. Corp. (1983) 460 U.S. 1 at 23, 26.

All facts surrounding Plaintiff's State and Federal Complaints show that this Motion to Dismiss should be granted, seeing as how Plaintiff has already filed a parallel Complaint in State Court. Since there is no "property" in this case, the first factor of the Colorado River test is not applicable. Due to the fact that Plaintiff has already filed a Complaint in State Court, and that Defendants have already filed a Demurrer to said Complaint (which is to be heard on July 11, 2008), the more convenient forum is state court.[2] Moreover, in order to avoid any piecemeal litigation, the State Court is the proper forum since Plaintiff also included a Negligence Cause of Action, which was not set forth within the Federal Complaint. The California State Court clearly has jurisdiction over the causes of action set forth within the Complaint, and it is not the sole jurisdiction of the Federal Courts. By failing to bring all of Plaintiff's causes of action in the Federal Complaint (especially the Negligence Cause of Action), Plaintiff's actions create the kind of piecemeal litigation that the Colorado River doctrine was developed to prevent. Therefore, this factor weighs in favor of dismissing this action.

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[1] Defendants have concurrently filed a Request for Judicial Notice of Plaintiff's State Court Complaint with this instant Motion to Dismiss. Plaintiff's State Court Complaint is attached as Exhibit 1 to Defendants' Request for Judicial Notice.

Since Plaintiff filed his State Court Complaint on July 3, 2007, and did not file the Federal Complaint until January 11, 2008, the State Court obtained jurisdiction first.[3] This is another factor that weighs in favor of dismissing this action. Since state or federal law can provide a decision on the merits of the causes of action, the State Court is an acceptable forum. Since the claims could be (and were) brought in the state action, and the determinative factual issues are the same in both cases, the state court can adequately protect the parties' rights to those claims. Furthermore, based on the fact that the other factors weigh in favor of dismissal, this Motion to Dismiss should be granted.

2. Forum Shopping Should Not Be Allowed.

By filing a Federal Complaint after having filed a State Complaint on the same factual issues, Plaintiff is seeking to "forum shop", which should not be allowed. A court may also consider whether the federal plaintiff is engaged in "forum shopping" or seeking to avoid adverse state court rulings. Nakash v. Marciano (1989) 882 F.2d 1411, 1417 (9th Circuit.) It is quite evident (by a review of the Complaints) that Plaintiff is seeking to forum shop. Importantly, it was not until after Defendants filed its Demurrer with the State Court (on May 13, 2008) that Plaintiff actually served Defendant ILLES with this Federal Complaint at issue. (Please see Declaration of Davina Bloom ¶ 9.) Consequently, since it is apparent that Defendants' Demurrer will be sustained (as being barred by the statute of limitations and failure to state causes of action), Plaintiff shortly thereafter sought to finally have Defendant ILLES served with the Federal Complaint. Plaintiff decided to do this as a way to avoid a (probable) state court ruling. Plaintiff is forum shopping. Respectfully, if the Court allows a substantially similar federal action to proceed, this will encourage forum shopping. This should not be allowed. Thus, Defendants request that this Motion be dismissed (for all the foregoing reasons), as well as in favor of judicial economy and resources.

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[2] Please see Exhibits 1 and 2 of Defendants' Request for Judicial Notice, which is being filed concurrently with this Motion to Dismiss.

[3] Please see Exhibits 1 of Defendants' Request for Judicial Notice, which is being filed concurrently with this Motion to Dismiss.

C. DEFENDANTS SHOULD BE AWARDED SANCTION FOR THE FILING OF THIS MERITLESS COMPLAINT.

Due to the fact that Defendants had to file this Motion to Dismiss to Plaintiff's Complaint (which was filed in bad faith) and for which he had no jurisdiction to bring this Complaint (and for which he admitted in his Complaint), Defendants are seeking sanctions against Plaintiff. Although the Court often declines sanctions pursuant to 28 U.S.C.S. § 1927, because a Plaintiff is a pro se litigant, the Court can still impose sanctions under its inherent powers. Godwin v. M. Dale Marsh (2002) 266 F.Supp.2d 1355, 1360. Thus, this is what Defendants seek.

Defendants believe that Plaintiff filed his Complaint with this Court in bad faith, which is apparent by a review of this Motion itself. First, although he states the Court is the proper venue, his own Complaint essentially admits that the Court has no subject matter jurisdiction (as discussed in detail above.) Second, Plaintiff brought this Complaint in Federal Court knowing full well that he already filed a Complaint in State Court for the same claims on the set of facts. When Defendant Illes was served with this Federal Complaint, Defense counsel Davina Bloom called up Plaintiff to discuss the matter with him. (Please see Declaration of Davina Bloom ¶ 10.) Specifically, on May 20, 2008, Attorney Bloom informed Mr. Elasali that what he did was improper, seeing as how he already had a State Court Complaint regarding the same set of facts. Furthermore, Attorney Bloom informed Mr. Elasali that if he did not withdraw his Complaint, and forced Defendants to file a Motion to Dismiss the Complaint that was filed in bad faith, then Defendants were going to seek sanctions against Plaintiff. Mr. Elasali's

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response was that if the Judge ordered him to pay fees to Defendants, then that was "fine." (Please see Declaration of Davina Bloom ¶ 10.)

Instead of determining if what Attorney Bloom stated was accurate, Plaintiff stated he was "fine" with sanctions. Thus, Plaintiff essentially forced Defendants to file this Motion to Dismiss Plaintiff's Complaint. Such is bad faith (for all the reasons set forth above.) Defendants incurred attorneys' fees. If the Court allows Defendants to receive its attorneys fees, Defendants can submit an itemization of the fees incurred in a separate Motion.

V. CONCLUSION

Based on the foregoing, it is evident that Plaintiff cannot establish diversity (considering his own admissions.) Thus, subject matter jurisdiction is lacking in its entirety. Furthermore, since Plaintiff filed a parallel action in State Court regarding claims involving the same set of facts, this Motion should be granted, as "forum shopping" should not be allowed. In the event that the judicially noticeable evidence discussed above is insufficient, an evidentiary hearing is requested.

Respectfully Submitted,

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Dated: June 3, 2008

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